Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MARK DONISI, Defendant.	No. CR 06-3055-MWB **MEMORANDUM OPINION AND ORDER REGARDING DEFENDANT'S MOTION IN LIMINE** **TO BE FILED UNDER SEAL**

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I. INTRODUCTION

In a Third Superseding Indictment (docket no. 66) handed down August 28, 2007, defendant Mark Donisi is charged with seven offenses, as follows: **Count 1** charges that, between about 2001 and August 2, 2006, the defendant manufactured and attempted to manufacture 100 or more marijuana plants in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846; **Count 2** charges that, on or about August 2, 2006, the defendant conspired to manufacture 100 or more marijuana plants, to manufacture 100 kilograms or more of marijuana, to distribute 100 kilograms or more of marijuana, and to possess, with intent to distribute, 100 kilograms or more of marijuana, in violation of 21 U.S.C. § 846; **Count 3** charges that, on or about August 2, 2006, the defendant possessed, with intent to distribute, mixtures and substances containing a detectable amount of nandrolone and stanozolol (anabolic steroids), in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D); **Count 4** charges that, on or about August 2, 2006, the defendant possessed, with intent to distribute, a mixture or substance containing a detectable amount of oxycodone, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C); **Count 5** charges that, on or about August 2, 2006, the defendant possessed, with intent to distribute, a mixture or substance containing a detectable amount of marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D); **Count 6** charges that, on or about August 2, 2006, the defendant, then being an unlawful drug user of marijuana, anabolic steroids, and oxycodone, possessed one or more firearms in violation of 18 U.S.C. § 922(g)(3); and **Count 7** charges that, between about 2001 and August 2, 2006, the defendant conspired to commit money-laundering offenses consisting of promoting unlawful activity and concealing proceeds of illegal activity, in violation of 18 U.S.C. § 1956(h). The Third Superseding Indictment also charges that certain property should be forfeited to the United States if the defendant is

convicted of certain of the criminal charges. Trial in this matter is currently set to begin with jury selection on September 28, 2007.

In anticipation of trial, Donisi filed the September 17, 2007, Motion In Limine (docket no. 73) now before the court. In his motion, Donisi seeks to exclude the following four categories of evidence: (1) any reference by Jill Donisi, the defendant's ex-wife, to the defendant's forced resignation of his job as a teacher and counselor with the Mason City Public School system in 2001 based upon an allegation of having an extra-marital affair with a student; (2) any reference by Jill Donisi to the defendant's alleged prior use of cocaine or methamphetamine; (3) any reference by Doug Sturges to his fear of retaliation from the defendant and that he did not want to get involved in this case, because Mr. Sturges has heard stories "of what drug dealers do to people"; and (4) any reference by Special Agent Chris York or Task Force Officer Dale Moyle to their proffer interview of the defendant on March 26, 2007, if the defendant does not testify.

On September 24, 2007, the government filed its Resistance, In Part, To Defendant's Motion In Limine (docket no. 78). In its Resistance, the government represented that it does not intend to offer any of the evidence in categories (1) and (3) above. On the other hand, the government represents that it does intend to offer evidence from the defendant's proffer, pursuant to the terms of the proffer agreement, in rebuttal to any trial testimony or other evidence that the defendant may offer that is contrary to his proffer, and does intend to offer evidence of the defendant's prior drug use pursuant to Rule 404(b) of the Federal Rules of Evidence.

The defendant's Motion In Limine is now fully submitted. The court will consider the admissibility of the disputed categories of evidence in turn.

II. LEGAL ANALYSIS

A. Prior Drug Use

Donisi seeks to exclude evidence, through his ex-wife, Jill Donisi, of his prior use of cocaine, methamphetamine, or LSD prior to the timeframe of the indictment. He contends that such evidence would be introduced solely to prove his propensity to commit criminal acts, because nothing about his prior use of cocaine, methamphetamine, or LSD is relevant to any material issue, and such drug use is not similar in kind or close enough in time to the charged conduct. That being so, he contends that such evidence is unduly prejudicial. The government, on the other hand, argues that evidence it will offer of Donisi's use of and distribution of marijuana, cocaine, and methamphetamine from 1991 through 2001, when Jill Donisi moved out of the residence, is, in part, uncharged misconduct that is admissible under Rule 404(b) to show Donisi's knowledge, intent, motive, and absence of mistake.

Rule 404(b) of the Federal Rules of Evidence prohibits admission of prior convictions and "bad acts" simply to show a propensity to commit a charged offense, but does permit such evidence to be admitted for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b). The Eighth Circuit Court of Appeals has explained the scope of admissibility of evidence pursuant to Rule 404(b), as follows:

> While we have interpreted Rule 404(b) to be a rule of inclusion, *see United States v. Sykes*, 977 F.2d 1242, 1246 (8th Cir. 1992), this interpretation does not give the government the unhindered ability to introduce evidence of prior crimes. Instead, the evidence of prior crimes must be 1) relevant to a material issue; 2) similar in kind and not overly remote in time to the charged crime; 3) supported by sufficient evidence; and 4) such that its potential prejudice

> does not substantially outweigh its probative value. *See United States v. Williams*, 308 F.3d 833, 837 (8th Cir. 2002).

United States v. Crenshaw, 359 F.3d 977, 998 (8th Cir. 2004); *accord United States v. Lakoskey*, 462 F.3d 965, 979-80 (8th Cir. 2006) (reiterating that Rule 404(b) is a rule of inclusion and that evidence is admissible under Rule 404(b) if it satisfies the same four-factor test), *cert. denied*, ___ U.S. ___, 127 S. Ct. 1388 (2007). Thus, the Eighth Circuit Court of Appeals will reverse admission of purported Rule 404(b) evidence "'only when such evidence clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts.'" *United States v. Marquez*, 462 F.3d 826, 830 (8th Cir. 2006) (quoting *United States v. Thomas,* 398 F.3d 1058, 1062 (8th Cir. 2005), with internal quotations omitted).

As to the first factor in the test for admissibility of such evidence, relevance to a material issue, *see Lakoskey*, 462 F.3d at 979-80; *Crenshaw*, 359 F.3d at 998, the Eighth Circuit Court of Appeals has "frequently upheld the admission of prior drug convictions to show knowledge and intent when the defendant denied the charged drug offense." *Marquez*, 462 F.3d at 830. The government has not, however, identified any prior *convictions* for drug offenses. Nevertheless, evidence sufficient to show involvement with controlled substances is likewise probative of knowledge and intent to manufacture or distribute marijuana, where the defendant denies that he was a "dealer."

The second factor, assessing whether the prior convictions are "similar in kind" to the charged offense, *see Lakoskey*, 462 F.3d at 979-80; *Crenshaw*, 359 F.3d at 998, is more problematic here. Donisi is charged with crimes involving the manufacture, distribution, and possession with intent to distribute of marijuana, anabolic steroids, and oxycodone. While the challenged evidence does not involve marijuana, anabolic steroids, or oxycodone at all, and appears to be evidence only of "use" or "possession" of other

controlled substances, some of the evidence that the government asserts that Ms. Donisi will provide appears to be of "distribution" of controlled substances other than those at issue in this case. Thus, only some of the evidence of prior drug activity can be shown to be "similar in kind" to the charged offenses here. *Id.* at 979-80 (second factor); *Crenshaw*, 359 F.3d at 998 (same).

The court will also assume, without deciding, that the government can likely satisfy the third factor, by offering only limited evidence to substantiate the prior drug activity. *Id.* (third factor); *Crenshaw*, 359 F.3d at 998 (same); *see also United States v. Ruiz-Estrada*, 312 F.3d 398, 403-04 (8th Cir. 2002) (the government offered sufficient reliable evidence of a prior conviction in the form of a certified copy of the criminal complaint and a warrant of commitment).

Thus, although the picture is somewhat mixed, the first three factors do not strongly support either admission or exclusion of Ms. Donisi's evidence of defendant Donisi's prior drug activity.

The fourth factor, the balance of probative value and prejudice, *Lakoskey*, 462 F.3d at 979-80 (fourth factor); *Crenshaw*, 359 F.3d at 998 (same); *see also Clark v. Martinez*, 295 F.3d 809, 814 (8th Cir. 2002) (Rule 403 applies to evidence otherwise admissible pursuant to Rule 404(b)); *United States v. Mound*, 149 F.3d 799, 801-02 (8th Cir. 1998) (same), *cert. denied*, 525 U.S. 1089 (1999), however, tips the balance against admission of at least some of the evidence of prior drug activity. To the extent that evidence of prior drug activity is not shown to involve the same controlled substances—that is, marijuana, anabolic steroids, or oxycodone—or the same conduct—that is, manufacture or distribution of controlled substances—its probative value is slight, and the potential for unfair prejudice, in the form of conviction of the charged offenses because the defendant has engaged in prior drug activity, is substantial. Moreover, the court has considerable doubt

that any potential prejudice of such evidence will be fully mitigated, even if the government is allowed to present only limited evidence to prove the prior drug activity. *But see United States v. Headbird*, 461 F.3d 1074, 1078 (8th Cir. 2006) (a defendant is not unduly prejudiced where the evidence of prior convictions consists of "little beyond the fact and nature" of the prior offenses). Finally, because the probative value of the evidence of prior drug activity not involving any of the controlled substances or any of the specific conduct at issue in the charged offenses is tenuous, the court also doubts that the potential for prejudice will be mitigated by a limiting instruction reminding the jurors that they may consider this evidence only for a purpose permissible under rule 404(b), not to decide whether Donisi is guilty of the charged offense. *But see United States v. Walker*, 470 F.3d 1271, 1275 (8th Cir. 2006) ("[A] limiting instruction [concerning proper use of evidence of a prior conviction] diminishes the danger of unfair prejudice arising from the admission of the evidence."); *United States v. Spears*, 469 F.3d 1166, 1170 (8th Cir. 2006) (also finding a limiting instruction adequate to guard against potential prejudice), *petition for cert. filed* (March 2, 2007) (No. 06-9864); *Marquez*, 462 F.3d at 830 (there was no abuse of discretion in admitting evidence of prior drug convictions where the district court gave such a limiting instruction); *and compare Crenshaw*, 359 F.3d at 1001-02 (the government's actual use of the evidence of a prior conviction did not demonstrate that the evidence was used to prove intent and the court's instruction failed to mention intent as a basis for considering the evidence). Therefore, evidence of drug activity by the defendant that does not involve either the controlled substances—marijuana, anabolic steroids, or oxycodone—or the activity—manufacture or distribution of controlled substances—at issue in the present charges will be excluded.

B. Evidence Of The Defendant's Proffer

The government also disputes Donisi's attempt to exclude evidence of his proffer interview with Special Agent Chris York and Task Force Officer Dale Moyle on March 26, 2007. Donisi contends that, if he does not testify at trial, it would be inappropriate and a violation of his rights under the Fifth Amendment of the United States Constitution for the government to use his proffer statements, because allowing the government to do so would compel him to be a witness against himself. The government, however, contends that the proffer agreement provides for use of the proffered information, *inter alia*, to impeach Donisi's credibility, to focus questioning during cross-examination, and in a rebuttal case against Donisi. Thus, the government contends that, under the terms of the proffer agreement, if Donisi testifies or offers evidence contrary to the information that he provided in the proffer, the government may offer testimony about his proffer. There is apparently no disagreement between the parties that Donisi's proffer statements may be used to impeach him if he testifies. The dispute seems to be with whether or not his proffer statements can be used to rebut other evidence that he may offer that is contrary to his proffer statements.

In *United States v. Mezzanatto*, the United States Supreme Court noted that Rule 410 of the Federal Rules of Evidence and Rule 11(e)(6) of the Federal Rules of Criminal Procedure "provide that statements made in the course of plea discussions between a criminal defendant and a prosecutor are inadmissible against the defendant," but overturned lower court holdings that these exclusionary provisions could not be waived by a defendant. *Mezzanatto*, 513 U.S. at 197. Where, as here, there is no complaint that such a waiver was unknowing or involuntary, it will be enforced. *Id.* at 211. At least as the terms of the proffer agreement have been quoted by the government, the proffer agreement waives exclusionary protections, because it expressly allows incriminating

statements in the proffer to be used "in a rebuttal case against your client." Government's Resistance at 2 (quoting Proffer Agreement at 2). Thus, the waiver provision here extends to use of proffer statements to rebut the defendant's evidence, not merely to impeach his testimony, if he testifies at trial. Therefore, the portion of Donisi's Motion In Limine seeking to exclude any and all use of his proffer statements if he does not testify will be denied. Pursuant to the terms of the proffer agreement, the government may use Donisi's proffer statements "in a rebuttal case against [him]," if he presents evidence that is contrary to his proffer statements.

III. CONCLUSION

Upon the foregoing, defendant Donisi's September 17, 2007, Motion In Limine (docket no. 73) is **granted in part and denied in part**, as follows:

1. That part of the motion seeking to exclude any reference by Jill Donisi, the defendant's ex-wife, to the defendant's forced resignation of his job as a teacher and counselor with the Mason City Public School system in 2001 based upon an allegation of having an extra-marital affair with a student is **granted**, upon the government's representation that it will not seek to offer such testimony;

2. That part of the motion seeking to exclude any reference by Jill Donisi to the defendant's alleged prior use of cocaine or methamphetamine is **granted** to the extent that evidence of drug activity by the defendant that does not involve either the controlled substances—marijuana, anabolic steroids, or oxycodone—or the activity—manufacture or distribution of controlled substances—at issue in the present charges will be excluded;

3. That part of the motion seeking to exclude any reference by Doug Sturges to his fear of retaliation from the defendant and that he did not want to get involved in this case, because Mr. Sturges has heard stories "of what drug dealers do to people," is

granted, upon the government's representation that it will not seek to offer such evidence; and

4. That part of the motion seeking to exclude any reference by Special Agent Chris York or Task Force Officer Dale Moyle to their proffer interview of the defendant on March 26, 2007, if the defendant does not testify, is **denied**. Pursuant to the terms of the proffer agreement, the government may use Donisi's proffer statements "in a rebuttal case against [him]," if he presents evidence that is contrary to his proffer statements.

IT IS SO ORDERED.

DATED this 25th day of September, 2007.

Mark W. Bennett

MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA